

Supreme Court of Florida

CASE NO.: SC96629

INQUIRY CONCERNING A
JUDGE, NO. 99--9

vs. RE: PATRICIA A. KINSEY

Petitioner

Respondent

Respondent's Reply to Judicial Qualifications Commission's Reply

Although Special Counsel say they fail to see the relevance of questioning the applicability of Canons 1, 2 and 3, the Hearing Panel relied on their applicability in evaluating Judge Kinsey's campaign. For example, if Canon 3B(9) does not apply to a candidate who is not an Article V judge, the fact that the Johnson and Alsdorf cases were pending at the time she used them in her campaign brochure would not be a basis for charging a violation of Canon 7.¹

By challenging the applicability of Canons 1, 2 and 3 to candidates who do not hold an Article V judgeship, Judge Kinsey is not attacking the principles stated in those canons. She is simply asking that recognized principles of statutory construction be applied and the canons strictly construed.

Article V, section 12 of the Florida Constitution creates a judicial qualifications commission with jurisdiction to investigate and recommend to the Supreme Court the discipline of judges whose conduct warrants discipline. Discipline is defined as reprimand,

¹ Because both defendants were charged with felonies, it is highly unlikely either the Johnson or Alsdorf case would come before Judge Green or Judge Kinsey after the defendants made their first appearances.

fine, suspension with or without pay, and lawyer discipline. Since violation of the canons of the Code of Judicial Conduct subject a judge to discipline, the canons are penal in nature.

If this court were interpreting a criminal statute, it would not regard someone or something as included within the statute if that person or thing were not clearly defined as being included. For example, a defendant found guilty by a jury of a felony, but for whom the sentencing judge withheld adjudication of guilt, can not be properly convicted of possession of a firearm by a convicted felon because the defendant would not fall within the definition of convicted felon. Since the Definitions section of the Code of Judicial Conduct defines “judge” as meaning “Article V, Florida Constitution judges and, where applicable, those persons performing judicial functions under the direction and supervision of an Article V judge” a candidate for judicial office who is not an article V judge cannot by definition be a “judge” as the term is used in the code. As presently worded, Canons 1, 2 and 3 do not apply to candidates who are not Article V judges.²

The Evidence Does Not Support the Hearing Panel's Finding of a Knowing
Misrepresentation in the Grover Heller Brochure

Special Counsel's argument makes it is apparent they misread James Spearing's testimony. Reading all his testimony makes it clear the quoted testimony about the “typical reader” taking 7 to 10 seconds from the time they take a campaign brochure out of the mail

² This court's web site recognizes the inapplicability of Canons 1, 2 and 3 to candidates who are not Article V judges. One question in the “Frequently Asked Questions” section is “What Are the Ethics Standards for State Judges?” The question is answered “The ethical standards for judges are called the Code of Judicial Conduct. They apply to all sitting judges. Canon 7 of the Code also applies to anyone seeking judicial office, such as in an election.” (Emphasis added)

box until they throw it in the trash actually refers to the amount of time a campaign has to get a voter's attention ("hook" is the term used by Spearing) and have the voter select that brochure from other mail for further examination. Mr. Spearing was not suggesting 7 to 10 seconds was the amount of time a voter would spend reading the brochure if the campaign was successful in getting the voter's attention.

Special counsel also says it is "telling" that Mr. Spearing could not correctly recall (nearly two years after the brochure was published) whether Judge Green revoked Heller's bond, citing this as evidence of intentional misrepresentation. To the contrary, this supports Judge Kinsey's contention that the purpose of the brochure was to inform voters how Judge Green treated two frightened, elderly people who appeared before him and the brochure was not concerned with whether Judge Green revoked Heller's bond.

The charge is based on the brochure's use of the word "instead" which it contends was a knowing misrepresentation because Judge Green eventually revoked the bond.³ There is no allegation any of the underlying events of the incident were misrepresented. Rather than examining whether information about how a sitting judge treated two elderly citizens who appeared before him is information voters need (and are entitled to receive) to make an intelligent choice between candidates, the Hearing Panel ignored at least two references in the text of the reprinted newspaper articles to the revoked bond. It then apparently engaged in the semantic analysis suggested by Special Counsel and concluded that because "instead"

³ Although Judge Green did revoke Heller's bond at the end of the hearing, it is clear from the transcript he did this because Heller failed to contact his public defender, not to protect the parents.

can be defined as “in place of,” “as a substitute for,” or “an alternative to” and Judge Green eventually revoked the bond, there was a knowing misrepresentation.⁴

Although the language stating the bond was revoked was in smaller type than the headline, this should be significant only if the bond revocation were the focus of the brochure. Reading the brochure makes it clear that whether or not Judge Green revoked the bond played no role in the theme of the brochure.⁵

The Evidence Does Not Support the Hearing Panel’s Finding of a Knowing
Misrepresentation Of the Charges in the Stephen Johnson Case

The Hearing Panel’s finding of a knowing misrepresentation is based on its conclusion Judge Kinsey intentionally misrepresented the seriousness of the charges against Stephen Johnson at the time of his first appearance because the brochure left the impression he had been charged with attempted first degree murder and burglary and these charges were not officially pending at that time. Special Counsel contended Judge Kinsey made a calculated decision to gain a tactical advantage by intentionally misrepresenting the charges against Johnson. There are at least three fallacies to this argument. First, the focus of the brochure was Judge Green’s failure to protect the community. Second, Johnson’s actions were so

⁴ The Hearing Panel found Judge Kinsey “not guilty” of essentially the same charge with regard to a radio advertisement because it was a 60 second radio spot and “did not have to contain the full facts of the controversy.” While the brochure did contain the full facts in the reprinted articles, apparently the bond revocation was not given the emphasis desired by the Hearing Panel.

⁵ It is clear from witnesses at the hearing and Judge Green’s statement to the reporter who covered the story that threatening to jail victims for their own protection was not a technique he confined to the Heller case.

dangerous there was no need to misrepresent anything.⁶ Third, if there had been intent to misrepresent the nature of the charges, it would have been easy to add verbiage to the brochure which would have technically avoided the problem. Simply adding the words “later formally charged with attempted first degree murder and burglary” would be technically correct while not in any way diminishing the effect of the brochure. If the Kinsey campaign was “pushing the envelope” as Special Counsel suggests and plotting to mislead voters by misstating the charges, wouldn’t it have been smart enough to include language that was technically correct?

Special Counsel ignores the obvious purpose of the brochure. By providing examples of how Judge Green protected the community, voters were given information to evaluate how he made decisions. Is it asking too much of a judge handling first appearances to recognize that a man who threatens to kill his wife, who violates a domestic violence injunction by going to her home in the dark of night, who cuts her telephone line, who tapes a window to prevent breaking glass from awakening her, and who cuts a strip of duct tape to restrain her, is a danger to the community? Should a judge with twelve years experience escape criticism because the initial charges brought by a law enforcement officer who may have no education beyond high school are eventually modified by the assistant state attorney assigned to prosecute the case?

⁶ There is no allegation any information in the “facts of the case” section of the brochure was misrepresented or unavailable to Judge Green at Johnson’s first appearance. Johnson was a dangerous man and clearly a threat to his estranged wife. Judge Green’s failure to recognize this was a major point of the brochure.

The Hearing Panel failed to consider the duty of the first appearance judge to examine the arrest report and evaluate whether a defendant is a danger to the community. All the information which eventually resulted in the attempted first degree murder and burglary charges was available to Judge Green. Voters have a right to expect their trial judges have the experience and intelligence to evaluate this kind of information and protect the community from violent, dangerous defendants.

Using the Johnson and Alsdorf cases in her brochure was actually extremely fair to Judge Green.⁷ Rather than simply giving voters her opinion of how he mishandled these cases, Judge Kinsey presented facts of two cases which were independently examined by four circuit judges. Two circuit judges examined the evidence prior to issuing arrest warrants and ordered Johnson and Alsdorf held without bond.⁸ Two others heard the cases after Judge Green set bond. Both revoked the bonds and ordered Johnson and Alsdorf held without bond.⁹

The Evidence Does Not Support the Hearing Panel's Finding of an
Improper Comment on Two Pending Criminal Cases

⁷ In addition to permitting voters to compare how Judge Green handled these cases with how they were handled by four circuit judges, the use of the Johnson and Alsdorf cases allowed voters to examine how he was currently handling cases rather than using "stale" cases from early in his career which might not reflect his current philosophy about protecting the community.

⁸ Circuit judge Nancy Gilliam issued the arrest warrant for Alsdorf and ordered him held without bond. Circuit judge Ed Nickinson issued the arrest warrant for Johnson and ordered him held without bond.

⁹ Circuit judge Joseph Tarbuck revoked Johnson's bond. Circuit judge Laura Melvin revoked Alsdorf's bond.

The fact that Judge Kinsey's reference to the Johnson and Alsdorf cases in her campaign brochure would justify these defendants seeking her recusal in the hypothetical situation that she would somehow be called upon to sit on their cases does not establish a violation of the canons. Even if Canon 3B(9) applies to candidates that are not Article V judges, the reference to these two cases is protected speech. While Judge Kinsey recognizes there are permissible limits that may be placed on the speech of both candidates and judges, the use of these two cases in her campaign brochure did not rise to the level where limitation is permissible. All the information contained in the brochure was public record and available to any member of the general public.¹⁰

Constitutionally Protected Speech

Special Counsel incorrectly states Judge Kinsey does not contest the sufficiency of the evidence supporting the findings of guilt on charges 1 through 5. With the exception of when she misspoke by using the word "liberal" when she meant "lenient" during the WCOA radio program, the language used is undisputed. However, she does contest the sufficiency of the evidence both because it is protected speech and because she believed it was permissible under Canon 7.

While some restraint of judicial candidates' speech is permissible to preserve the integrity of the judicial process, this must be no more restrictive than absolutely necessary to achieve that objective. Voters are entitled to information that will enable them to make reasoned decisions when they cast their votes and candidates have the right to provide it. The

¹⁰ As pointed out in Judge Kinsey's initial response to the Order to Show Cause, a jury was selected in the Johnson case without difficulty.

statements in Judge Kinsey's campaign brochures were intended to make voters aware of what she felt were major issues in the campaign. For example, the undisputed evidence was Judge Green repeatedly stated that if the only evidence in a case was the testimony of a criminal defendant and the testimony of a law enforcement officer, he would rule for the defendant every time. Judge Kinsey felt this was as wrong as a judge always accepting the testimony of a law enforcement officer and believed voters had a right to this information when deciding whether to vote for her or Judge Green.

Her campaign brochures stressed the support she received from law enforcement as these were people who knew her best. She worked closely with them while serving as an assistant state attorney. They also saw how Judge Green handled cases, how he treated victims and how he failed to hold criminals accountable. She knew Escambia county voters respected law enforcement officers and would ask their opinion before casting their votes. She believed she was entitled to make voters aware of their support.

Language used in the brochures was designed to make voters aware of problems and issues, such as Judge Green's failure to protect victims of crime.¹¹ In retrospect she probably should have placed more emphasis on a judge's role by using the specific words "faithful and impartial performance of the duties of office" in addition to stating she would be "Tough ... Fair ... Compassionate."

¹¹ Special Counsel stressed the brochures did not contain language saying Judge Kinsey would protect criminal defendants' rights. However, there was never any issue of defendants' rights not being protected.

If Special Counsel's arguments are followed to their logical conclusion, no criticism of an incumbent judge is permissible under Canon 7 as criticism of the incumbent must implicitly mean the challenger would do things differently, which would be an improper "pledge or promise of conduct in office" or "commits or appears to commit the candidate with respect to cases or controversies or issues likely to come before the court" in violation of Canon 7.¹²

No elected official has a vested right to retain their office beyond the term they were elected to serve. They serve beyond that term only if voters return them to office. Any candidate who meets constitutional requirements should feel free to oppose an incumbent's re-election and not hesitate to run for the office.¹³

While good arguments can be made for both the election and appointment of trial judges, voters of this state have chosen to continue to select trial judges by election. If voters are entrusted with this responsibility, shouldn't candidates not only be permitted, but actively encouraged, to furnish voters information relevant to the performance of the duties of the office? If this is unreasonably restricted, won't judicial elections become personality contests or attacks on candidates' private lives? Doesn't the judicial system benefit if candidates examine job performance and legal philosophy rather than opponents' religion, ethnic background or divorces?

¹² It is undisputed that throughout the campaign Judge Kinsey refused to answer questions inquiring how she would rule on issues such as abortion, school prayer, gun control and the death penalty.

¹³ The hearing panel in In re McMillan, case no. 95,866, stated trial judges have a "special duty" not to discourage qualified attorneys from seeking judicial office.

Judge Kinsey's criticism of Judge Green focused on job performance. She did not invade his private life or attack him personally. An underlying theme of Special Counsel's argument is her campaign was unfair because it was well organized, well funded and made decisions that gave it tactical advantages.¹⁴ Special Counsel implies publishing brochures shortly before the election when Judge Green might find it difficult to respond gave her an unfair advantage. An election is not a trial where parties present their evidence and arguments in a calm, structured manner. An election is an intense, fast paced competition for voters' attention and support. While judicial campaigns must comply with Canon 7, the fact one candidate gains a tactical advantage over another should not result in discipline. The purpose of Canon 7 is to protect the integrity of the judicial process, not prevent one candidate from presenting truthful, but damaging information about another.

Perhaps most distressing to Judge Kinsey is Special Counsel's efforts to create the image of her and her campaign workers plotting how they could misrepresent Judge Green's record and gain an unfair advantage in the campaign. Fortunately, it is obvious from the testimony and evidence at the hearing, plus the more than 100 character affidavits, that not only would she not stoop to this, but misrepresentation was totally unnecessary.

Judge Kinsey acknowledged that while errors were made, the campaign worked hard to corroborate information used in the brochures using public records, transcripts and first hand testimony. The Hearing Panel apparently recognized this as it made a specific finding that the conduct in In re: Alley, 699 So.2d 1369 (Fla. 1997) was of a more egregious nature

¹⁴ It is undisputed Judge Kinsey made no attempt to "ambush" Judge Green. He knew she intended to run against him more than nine months before the campaign.

than the conduct charged against Judge Kinsey (p. 30).¹⁵ In the Recommendations section it even used the term “significantly more egregious” (p. 33) to contrast the conduct in Alley from that of Judge Kinsey.¹⁶

It is not easy to define the line between permitted and prohibited speech in judicial elections. With due deference to the drafters, Canon 7 leaves much to be desired when a candidate attempts to determine what information may be given to voters without fear of being disciplined. As Special Counsel demonstrates, it is considerably easier to fault campaign language after an election is over than to recognize the potential for misinterpretation while drafting brochures during the intense pressure of a campaign. When her campaign began, the guidance available to Judge Kinsey consisted of little more than this court’s decision in Alley, the Code of Judicial Conduct, the guide to Canon 7 authored by Judge Charles Kahn, and several federal decisions from the Northern District of Florida. Other than Alley, none provided much specific guidance.

In evaluating her actions it is important to recognize that even if some of Judge Kinsey’s campaign literature is subject to criticism, she did not repeat the Alley mistakes of injecting partisan politics, publishing altered articles to create the false impression a newspaper endorsed her candidacy, or misrepresenting her basic qualifications and those of her opponent. This is most important when analyzing the misrepresentation charges. Based on the evidence, there is no logical basis to conclude a candidate who scrupulously avoided

¹⁵ The Hearing Panel in McMillan stated the “Panel findings in Kinsey show less severe election violations and absolutely no misconduct while on the bench.” (p. 43)

¹⁶ There was never any allegation Judge Kinsey injected party politics, altered newspaper articles or misrepresented either her or Judge Green’s basic qualifications.

the actions condemned in Alley would make intentional misrepresentations that not only have no real bearing on issues raised by the brochures, but which also gained no tactical advantage and would have been easily avoided if the candidate truly intended to make representations.

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